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BYG ARCHITECTURE SDN BHD v. MENTERI KEWANGAN MALAYSIA

HIGH COURT MALAYA, SHAH ALAM
SHAHNAZ SULAIMAN J
[JUDICIAL REVIEW NO: BA-25-86-12-2022]
B 22 AUGUST 2023

Abstract – *Under ss. 135 and 127(3A) of the Income Tax Act 1967 ('Act'), the Minister is given a discretion on matters pertaining to tax generally, ie, a Minister may give the Director General of Inland Revenue directions of a general character which is not inconsistent with the Act. These provisions, however, do not allow the Minister to exempt a taxpayer from paying the taxes due as and when the Minister pleases. If such a situation were to come into being, it would create chaos to the whole taxation legislative framework.*

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ADMINISTRATIVE LAW: *Judicial review – Mandamus – Application for – Rules of Court 2012, O. 53 r. 3(1) – Seeking for order for Minister to exercise power to give directions to Director General of Inland Revenue to set aside or exempt notice of additional assessments deemed served on applicant – Non-reply or non-response of Minister to applicant's letter – Whether s. 135 of Income Tax Act 1967 ('ITA') imposes legal duty on Minister to make decision – Whether ss. 135 and 127(3A) have nexus to set aside notice of assessment issued by DGIR – Whether applicant circumvented and failed to exhaust domestic remedy provided under ITA – Whether application for judicial review premature*

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REVENUE LAW: *Tax – Assessment – Application for judicial review – Seeking for order for Minister to exercise power to give directions to Director General of Inland Revenue to set aside or exempt notice of additional assessments deemed served on applicant – Non-reply or non-response of Minister to applicant's letter – Whether s. 135 of Income Tax Act 1967 ('ITA') imposes legal duty on Minister to make decision – Whether ss. 135 and 127(3A) of ITA have nexus to set aside notice of assessment issued by DGIR – Whether applicant circumvented and failed to exhaust domestic remedy provided under ITA – Whether application for judicial review premature*

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This was an application by the applicant seeking leave of the court to commence an application for judicial review under O. 53 r. 3(1) of the Rules of Court 2012 ('ROC'). The reliefs sought by the applicant were, among others, that the applicant be granted leave to file an application for (i) an order for the respondent to exercise its power under ss. 135 and/or s. 127(3A) of the Income Tax Act 1967 ('ITA') to give directions to the Director General of Inland Revenue ('DGIR') to set aside or exempt the notice of additional assessment ('Forms JA') for the years of assessment

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('YAs') 2018, 2019, 2020 and 2021, which was deemed served on the applicant ('decision') on the grounds that the said Forms JA were *ultra vires*, illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable and made without having any regard to the applicant's legitimate expectations; and (ii) a declaration that the applicant was exempted from paying any income tax for its foreign source income for the YAs 2018, 2019, 2020 and 2021 due to the applicability of para. 28 of Schedule 6 of the ITA. The Attorney General objected to this application for leave on the following grounds: (i) no decision, act or omission was made by the respondent (Minister of Finance) under O. 53 of the ROC; (ii) the notice of assessment was raised by DGIR who was not named as a party to this action; (iii) the applicant's relief was in effect a *mandamus*, however, the applicant failed to establish legal duty on the part of the respondent; (iv) ss. 135 and 127(3A) of the ITA does not have nexus to set aside the notice of assessment issued by DGIR; and (v) the applicant circumvented and failed to exhaust the domestic remedy provided under the ITA.

Held (dismissing application):

(1) The applicant in this case deemed that the respondent had made a decision when no reply was forthcoming from the respondent within the timeline imposed by the applicant. However, there must be clear evidence of a refusal to act. In this application for judicial review, the applicant had imposed a duty on the respondent to make a decision where one did not exist. Section 135 of the ITA does not impose a legal duty on the respondent. Therefore, the non-response by the respondent to the applicant's letter did not amount to a decision that was amenable to judicial review. (paras 12, 15 & 17)

(2) This application for judicial review was against the non-reply or non-response of the respondent to the applicant's letter seeking the respondent to give to the DGIR directions under s. 135 of the ITA and/or exempt the taxes raised under s. 127(3A) of the ITA. The directions sought were to be given to the DGIR and the taxes sought to be exempted were raised by the DGIR. Nonetheless, the court was satisfied that the application for judicial review was against the non-reply or non-response of the respondent to the applicant's letter. This was the 'decision' that the applicant had now brought for this application for judicial review. Thus, this court did not agree with the contention of the respondent that by not naming the DGIR, this action was frivolous or vexatious. (paras 19-21)

(3) There was no legal duty on the respondent to set aside the notice of assessment under s. 135 of the ITA. Therefore, the applicant could not compel the respondent to set aside the notice of additional assessment issued by the DGIR. What existed was the discretion of the respondent.

The respondent was not obligated to set aside the notice of assessment. A reading of s. 135 of the ITA plainly provides that the Minister may give DGIR directions of a general character which was not inconsistent with the ITA. In this application for judicial review, the applicant urged the respondent to exercise his power under s. 135 of the ITA. The applicant's letter urging the respondent to give the DGIR directions pertaining to the assessment of tax could not be viewed to be directions of a general character as provided in s. 135 of the ITA. Section 135 of the ITA could not be employed for the respondent to give directions to the DGIR. (paras 27-30)

(4) Both ss. 135 and 127(3A) of the ITA give the Minister a discretion on matters pertaining to tax generally. This could include exempting a particular class of income. These provisions do not allow the Minister to exempt a taxpayer from paying the tax due as and when the Minister pleases. If such a situation were to come into being, it would create chaos to the whole taxation legislative framework. What would be the point of the DGIR issuing notice of assessments when it could easily be exempted by the Minister? Sections 135 and 127(3A) did not have nexus to set aside the notice of assessment issued by the DGIR. (paras 35 & 36)

(5) The law provides for an avenue to appeal to be exhausted first before the Special Commissioners of Income Tax pursuant to s. 99 of the ITA. There was no information as to whether the applicant had brought the applicant's grievance to the Special Commissioner of Income Tax. Thus, the applicant's application for judicial review was premature. (paras 40 & 41)

Case(s) referred to:

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Berjaya Times Square Sdn Bhd v. Menteri Kewangan Malaysia [2023] 1 LNS 233 HC ***(refd)***

Dell Global Business Center Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2021] 10 CLJ 411 HC ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor [1993] 4 CLJ 211 SC ***(refd)***

Oriental Assembler Sdn Bhd v. Menteri Kewangan & Anor [2018] 1 LNS 975 HC ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***
Winsome Al-Yatama Sdn Bhd v. Pentadbir Tanah Kota Tinggi [2015] 9 CLJ 110 HC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2), Schedule para 1
Income Tax Act 1967, ss. 99, 127(3A), 135, Schedule 6 para 28
Rules of Court 2012, O. 53 rr. 2(4), 3(1)

For the applicant - S Saravana Kumar & Felicia Wong Sie Ying; M/s Rosli Dahlan Saravana Partnership
For the Attorney General's Chambers - Krishna Priya Veenagopal

Reported by Suhainah Wahiduddin

JUDGMENT

(Pertaining to an application pursuant to O. 53 r. 3(1) of the Rules of Court 2012)

Shahnaz Sulaiman J:

Introduction

[1] This is an application by the applicant, BYG Architecture Sdn Bhd seeking leave of this court to commence an application for judicial review under O. 53 r. 3(1) of the Rules of Court 2012 ("ROC 2012"). The reliefs sought by the applicant are, among others, are reproduced below:

(i) that the applicant be granted leave of this Honourable Court to file an application for:

(a) an order for the respondent to exercise its power under s. 135 and/or s. 127(3A) of the Income Tax Act 1967 ("ITA") to give directions to the Director General of Inland Revenue ("DGIR") to set aside or exempt the notice of additional assessment ("Forms JA") for the year of assessment ("YAs") 2018, 2019, 2020 and 2021 all dated 16 December 2022, which is deemed served on the applicant on 19 December 2022 ("decision"), on the grounds that the said Forms JA were *ultra vires*, illegal, void unlawful and/or in excess of authority, irrational and/or unreasonable and made without having any regard to the applicant's legitimate expectations; and

(b) a declaration that the applicant is exempted from paying any income tax its foreign source income for the YAs 2018, 2019, 2020 and 2021 due to the applicability of the para. 28 of Schedule 6 of the Income Tax Act 1967 ("ITA").

(ii) that all further proceedings including the enforcement of the Forms JA be stayed until the full and final determination of the judicial review application;

(iii) that all necessary and consequential directions and orders be given; and

(iv) that the costs of this application be costs in the cause.

Objection By The Attorney General

[2] The Honourable Attorney General objected to this application for leave on the following grounds:

(i) no decision, act or omission was made by the respondent (Minister of Finance) under O. 53 of the Rules of Court 2012;

(ii) the notice of assessment raised by DGIR who was not named as a party to this action;

(iii) the applicant's relief is in effect a *mandamus* however the applicant failed to establish legal duty;

(iv) sections 135 and 127(3A) of the ITA does not have nexus to set aside the notice of assessment issued by DGIR; and

(v) the applicant circumvented and failed to exhaust the domestic remedy provided under the ITA.

Brief Facts

[3] The applicant sent a letter dated 3 October 2022 to YB Minister of Finance (respondent) to express the applicant's concern and dissatisfaction with the DGIR's decision to raise the notice of additional assessment dated 14 April 2022, 2 March 2022, 5 September 2022 and 26 September 2022 tax due and payable by the applicant for year of assessment (YA) period 2015 to 2021 (Form JA).

[4] As a result of the applicant's dissatisfaction with the DGIR's decision, the applicant requested the respondent to give the DGIR directions under s. 135 of the ITA and/or exempt the taxes raised under s. 127(3A) of the ITA 1967.

Principles Relating To Leave For Judicial Review

[5] The guiding principles for leave for judicial review is that the applicant must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. In this regard, the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 stated as follows:

[12] For purposes of its application, the appellant had alluded to the statutory route of O. 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court. At the leave stage on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted (*IRC v. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617). In Malaysia, the Federal Court in *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 when allowing the appeal, opined that 'the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for *certiorari*'. Without the need to go into depth of the abundant authorities, suffice if we stage that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though *ie*, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[6] The Supreme Court in *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 (SC) stated the requirement for the application to challenge an Industrial Court award to show, *prima facie,* that it is not frivolous or vexatious and there is substance in the proposed challenge. The Supreme Court stated:

At the outset of the hearing of the appeal before us, we indicated to the parties that we would hear submissions on the issue of leave only … The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had *prima facie* an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted.

[7] Founded on the principles enunciated in the authorities stated above, this court will consider the application for leave.

Analysis And Findings

[8] This court will proceed to examine the objections raised by the learned Federal Counsel on behalf of the Honourable Attorney General.

(i) No Decision, Act Or Omission Was Made By The Respondent Under O. 53 Of The ROC 2012

[9] The learned Federal Counsel for the Attorney General submitted that there was no decision by the respondent which would be amenable to judicial review.

[10] The facts before this court are that the applicant had *via* letter dated 3 October 2022 to the respondent requested the respondent to give the DGIR direction under s. 135 of the ITA to direct the DGIR to review its exercise of power and functions. The applicant in the same letter sought the applicant to grant a tax exemption to the respondent in respect of tax payable and penalty raised under s. 127(3A) of the ITA. (See exh. YGB18 of encl. 3). Exhibit YGB18 went on to further state that the respondent sought the respondent to give the DGIR directions by 10 October 2022. In the event, there was no reply from the respondent by 10 October 2022, the applicant stated it assumed the respondent's office rejecting the applicant's request.

[11] The issue before this court therefore is whether when a reply was not received by the applicant within the time dictated by the applicant by way of letter dated 3 October 2022, it amounted to a decision. To consider this objection, this court alluded to O. 53 r. 2(4) of the ROC 2012 which reads:

> 4. Any person who is adversely affected by the **decision, action or omission** in relation to the existence of the public duty or function shall be entitled to make the application. (emphasis added)

[12] The applicant in this case deemed that the respondent had made a decision when no reply was forthcoming from the respondent within the timeline imposed by the applicant.

[13] In this regard, this court referred to the High Court case of *Winsome Al-Yatama Sdn Bhd v. Pentadbir Tanah Kota Tinggi* [2015] 9 CLJ 110; [2015] MLJU 711 where Mohd Nazlan bin Mohd Ghazali JC had elaborated on this issue. For ease of reference, the relevant paragraphs are reproduced below:

> [23] The question is whether the non-response by the respondent to the letter of the applicants dated 13 January 2015 by the deadline specified by them on 9 February 2015 can be considered as a form of decision, the act or omission in respect of which can legally attract the public law remedies of judicial review. It is trite law as emphasized by the Federal Court in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v. Tun Dato Seri Ahmad Fairuz Dato Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805, following *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 that *for a decision to be susceptible to judicial review, there must first be a decision by a decision maker or a refusal by him to make a decision, and that decision must affect the aggrieved party.*

[24] The parties before me at the hearing did not specifically submit on this point. Following my review of the law on the matter, I shall refer first to the case of *Re Bukit Sembawang Rubber Co Ltd v. Sembawang Estates Ltd* [1961] MLJ 269 (*Sembawang Rubber*). In this case, an order of *mandamus* was issued against the Collector of Land Revenue who failed to make an award after the enquiry under Section 10 of the Land Acquisition Ordinance, initially for about three months and then after citing a Government freeze on budget for development projects, for another three and a half years until the applicant wrote to the Collector. *The High Court stated that as a general rule, mandamus will not be granted unless it is shown by evidence that there was a distinct demand which the party seeking the mandamus desires to enforce and that that demand was met by a refusal.* The following part of the judgment on this point is of relevance to the instant case:

> According to the cases that have been cited, a refusal may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply.
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> In *R v. The Brecknock and Abergavenny Canal Company* 111 ER 395, Lord Denham CJ says (at p. 397):
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> > We cannot grant a *mandamus* unless there has been a direct refusal; and here, I think, there has not. It is not indeed necessary that the word refuse, or any equivalent to it, should be used; but there should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required. (emphasis added)

[14] Abdul Hamid Embong JCA in the case of *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704 stated as follows:

> [58] … We also find it ludicrous for the appellants to hold the view that a decision was only arrived at when the first respondent failed to respond to one week time period ultimatum in their letter. The latter was not duty-bound to respond to what we feel, corresponded to a threat.

[15] Hence, did the absence of a reply from the respondent to the applicant's letter amount to a decision by the respondent. The applicant contends it is a deemed decision. Based on the cases cited above, it is the considered view of this court that there must be clear evidence of a refusal to act. In this application for judicial review, the applicant had imposed a duty on the respondent to make a decision where one did not exist.

[16] Section 135 of the ITA provides for the respondent to give directions to the DGIR as follows:

> The Minister may give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act; and the Director General shall give effect to any directions so given.

[17] This court is of the considered view that s. 135 of the ITA does not impose a legal duty to the respondent. This court is therefore satisfied the non-response by the respondent to the applicant's letter dated 3 October 2022 does not amount to a decision that is amenable to judicial review.

(ii) The Notice Of Assessment Raised By DGIR Who Is Not Named As A Party To This Action

[18] The respondent in this application for judicial review is the Minister of Finance. The DGIR was not named as a party to this judicial review.

[19] The learned Federal Counsel submitted that by not naming the DGIR in this action is indeed frivolous and vexatious because the whole matter boils down to the assessment raised by DGIR hence, the assessment by DGIR is the decision that the applicant is dissatisfied with.

[20] This application for judicial review is against the non-reply or non-response of the respondent to the applicant's letter seeking the respondent to give to the DGIR directions under s. 135 of the ITA and/or exempt the taxes raised under sub-s. 127(3A) of the ITA.

[21] The directions sought are to be given to the DGIR and the taxes sought to be exempted are raised by the DGIR. Nonetheless, this court is satisfied that the application for judicial review is against the non-reply or non-response of the respondent to the applicant's letter. This is the "decision" the applicant has now brought this application for judicial review. This court respectfully does not agree with the contention of the learned Federal Counsel on this objection.

(iii) The Applicant's Relief In Effect A Mandamus However The Applicant Failed To Establish Legal Duty

[22] The Attorney General objected that the applicant in not entitled for a relief to compel the respondent to set aside the notice of assessment issued by DGIR dated 14 July 2021 as the respondent has no legal duty to do so. The applicant's prayer 1(a) of encl. 1 reads as follows:

> Suatu perintah bagi responden untuk menggunakan kuasanya di bawah seksyen 135 dan/atau Seksyen 127(3A) Akta Cukai Pendapatan 1967 ("ACP") untuk memberikan arahan-arahan kepada Ketua Pengarah Hasil Dalam Negeri ("KPHDN") mengetepikan atau mengecualikan notis-notis taksiran tambahan ("Borang-Borang JA") bagi tahun taksiran ("TT") 2018, 2019, 2020 dan 2021 semuanya bertarikh 16.12.2022 yang dianggap diserahkan kepada Pemohon pada 19.12.2022 ("Keputusan") atas alasan-alasan bahawa Borang-Borang JA tersebut adalah *ultra vires*, haram

(illegal), tidak sah (void), menyalahi undang-undang (unlawful) dan/atau melebihi kuasa (in excess of authority), tidak rasional (irrational) dan/atau tidak munasabah (unreasonable) dan telah dibuat tanpa mengambil kira jangkaan sah Pemohon.

[23] This court's jurisdiction to grant an order of *mandamus* is based on sub-s. 25(2) of the Courts of Judicature Act 1964 which reads:

Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[24] Additionally, para. 1 of the Schedule to the Courts of Judicature Act 1964 (Act 91) reads:

Prerogative writs 1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[25] With regard to the granting of *mandamus*, in the case of *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179 Aziah Ali J had stated:

[16] *Mandamus* can be granted only when a legal duty is imposed on an authority. In MP Jain '*Administrative Law of Malaysia and Singapore*' 3rd edn at pp. 652, 653 it is stated:

> The order of *mandamus* is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law … *Mandamus* can be granted only when (i) a legal duty is imposed on an authority, and it does not perform the same; and (ii) the applicant has a legal right to compel the performance of the public duty prescribed by law.
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> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, *mandamus* is not issued to compel him to exercise his power.

[26] The applicant seeks an order to compel the respondent to set aside the notice of additional assessment issued by the DGIR dated 16 December 2022. The question therefore is whether a legal duty exists for this court to grant a writ of *mandamus*.

[27] Section 135 of the ITA, in the view of this court does not impose a legal duty on the respondent. The applicant therefore cannot compel the respondent to set aside the notice of additional assessment issued by DGIR

dated 16 December 2022. This is because there is no legal duty on the respondent to set aside the notice of assessment under ITA. What exists is the discretion of the respondent. The respondent is not obligated to set aside the notice of assessment.

[28] In this regard, this court agrees with the objection by the learned Federal Counsel for the Attorney General.

(iv) Sections 135 And 127(3A) Does Not Have Nexus To Set Aside The Notice Of Assessment Issued By DGIR

[29] Section 135 of the ITA reads:

> The Minister may give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act; and the Director General shall give effect to any directions so given.

[30] A reading of s. 135 of the ITA plainly provides that the Minister may give the DGIR directions of a general character which is not inconsistent with the ITA. In this application for judicial review, the applicant in the letter dated 3 October 2022, urged the respondent to exercise his power under s. 135 of the ITA. Section 135 is designed to allow the Minister to give the DGIR directions of a general character. The applicant's letter urging the respondent to give the DGIR directions pertaining to the assessment of tax, in the considered view of this court, cannot be viewed to be directions of a general character as provided in s. 135 of the ITA. Moreover, s. 135 requires such direction of the Minister to the DGIR not to be inconsistent with the ITA. In this application for judicial review, this court is satisfied that s. 135 of the ITA cannot be employed for the respondent to give directions to the DGIR.

[31] The applicant had sought to challenge the respondent's deemed decision when the respondent did not reply to the applicant's request for an exemption under sub-s. 127(3A) of the ITA. The applicant had by way of letter dated 3 October 2022 sought for an exemption. This is evident from para. 24 of exh. YGB18 as follows:

> 24. As the DGIR has failed to take into account the nature of the business income of the Company and has misapplied the law, we humbly request Yang Berhormat Mulia pursuant to Section 135 of the ITA to direct the DGIR to review its exercise of power and functions so that the law is applied correctly and fairly.

[32] Subsection 127(3A) of the ITA reads as follows:

> (3A) The Minister may, in any particular case exempt any person from all or any of the provision of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind.

[33] Subsection 127(3A) of the ITA allows the Minister to exempt any person generally or in respect of any income of a particular kind or any class of income.

[34] A reading of s. 135 and sub-s. 127 (3A) of the ITA plainly allows the Minister's discretion. The word "may" connote a non-mandatory nature. In *Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 4 CLJ 211; [1993] 3 MLJ 691 Justice Eusoff Chin, Supreme Court Judge clearly stated that:

> The significance of such a provision in the Interpretation Act will remind the legal draftsman to always confine the use of the word "shall" to its mandatory sense, in contrast to the use of the word "may" which denotes a permission or discretion.

[35] Both s. 135 and sub-s. 127(3A) of the ITA give the Minister a discretion on matters pertaining to tax generally. This could include exempting a particular class of income. These provisions do not, in the considered view of this court, allow the Minister to exempt a taxpayer from paying the tax due as and when the Minister pleases. If such a situation were to come into being, it would create chaos to the whole taxation legislative framework. What would be the point of the DGIR issuing notice of assessments when it could be easily exempted by the Minister? In this case, the applicant itself had written to the respondent, urging, if not insisting the Minister to allow the applicant's appeal to the Minister.

[36] This court therefore agrees with the submission of the learned Federal Counsel that ss. 135 and 127(3A) does not have nexus to set aside the notice of assessment issued by the DGIR.

(v) The Applicant Circumvented And Failed To Exhaust The Domestic Remedy Provided Under The ITA

[37] The applicant in this present application challenged the applicant's notice of assessment issued by the DGIR dated 16 December 2022 for the years of assessment 2018, 2019, 2020 and 2021 to the applicant. The applicant has a right of appeal in law under s. 99 of the ITA.

[38] In *Dell Global Business Center Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2021] 10 CLJ 411, the court stated the following:

> [23] The principles governing the alternative remedy issue is well-settled and are as enunciated by the Supreme Court in *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185 ("*Jagdis Singh*"), which is incidentally a tax case.
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> [24] The *ratio decidendi* of the Supreme Court is stated in the following paragraphs of the judgment:

> … it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. *Judicial review is always at the discretion of the Court but where there are other avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.*
>
> … we would therefore hold that the discretion is still with the Courts but *where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.* (emphasis added)

[39] There are numerous cases on this question of whether an applicant should exhaust the domestic remedy available before making an application for judicial review. Cases have decided that the applicant is not entitled to initiate a judicial review proceeding against the respondent as the applicant had failed to exhaust the statutory appeal procedure available. (See: *Ketua Pengarah Hasil Dalam Negeri v. Alcatel Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563; *Oriental Assembler Sdn Bhd v. Menteri Kewangan & Anor* [2018] 1 LNS 975; *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235; [2009] 1 MLJ 555 (Court of Appeal); *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505; [2011] 2 MLJ 457).

[40] The ITA provides for the Special Commissioner for Income Tax to provide a specific avenue for aggrieved parties to air their grievances. Before this court, there is no information as to whether the applicant had brought the applicant's grievance to the Special Commissioner of Income Tax.

[41] This court is of the considered view that the applicant's application for judicial review is premature. The law provides for an avenue to appeal to be exhausted first before the Special Commissioners of Income Tax pursuant to s. 99 of the ITA.

Conclusion

[42] In conclusion, this court can do no better than to cite Amarjeet Singh J in *Berjaya Times Square Sdn Bhd v. Menteri Kewangan Malaysia* [2023] 1 LNS 233 as reproduced bellow:

> [17] The opening words of the first principal relief are: "an order for the Minister to exercise his powers". The powers referred to are housed in sections 135 and 127(3A) of the ITA. The use of such word is to compel the Minsiter to exercise the said powers and, in the manner, dictated by the Applicant. The said order is therefore in substance an order in the nature of *mandamus*. It is certainly not an order for *certiorari*. It is trite that an order of *certiorari* is to quash the legal effect of a decision and this is not made out by the words

employed in the relief sought. I have considered the submissions and agree with the Federal Counsel that the order as framed is an order in the nature of *mandamus* which cannot in law be granted on the face of what had been pleaded by the applicant. As such, there is no arguable case for the first principal order to be investigated at the substantive stage.

…

[29] The incontrovertible fact show that the Minister did not make any decision and did not reply to the applicant's letter. There is no therefore no nexus between the grounds raised in the Order Statement and the relief of *certiorari*, given the fact that the Minister as decision-maker did not make a decision. The grounds the applicant raised in the Order 53 statement seeks to quash a fictitious decision. As such, no arguable case for investigation at the substantive stage is made out and one which is fair to say is also frivolous and vexatious.

… The non-applicability of sections 135 and 127(3A) of the ITA

[36] Again, it is important to keep in mind the following crucial facts: (i) that the Minister did not make a decision in respect of the applicant's request; and (ii) that the assessment made by DGIR are illegal and/or unlawful id the tax cannot be levied in law. The applicant came to the Minister to set aside the assessment made by the DGIR by way of directions to the DGIR to set aside the same or to exempt the tax as assessed by the DGIR.

[37] In my view, the Minister has no power to do what the applicant is requesting him to do under sections 135 and/or 127(3A) of the ITA. As such, there is no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for *ie*, *mandamus*, *certiorari* and declaration on the material presented to this Court …

…

[42] In the instant case, the applicant is claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s. 127(3A) of the ITA. Unlawfully levied tax is the jurisdiction of the Special Commissioners. As such, s. 127(3A) of the ITA is only applicable where there is liability to pay lawfully assessed tax. Therefore the exemption sought in the instant case is something that the Minister has no power of doing. (See also *Sime Darby Property (Selangor) Sdn Bhd v. Menteri Kewangan Malaysia* [2023] MLRHU 190.)

[43] For the aforementioned reasons, and having considered the authorities cited, this court dismisses this application for leave to commence judicial review proceedings. Costs of RM10,000 to be paid subject to allocator.